
SHAFIE AHMAD**v.****HJH. FATIMAH AHMAD & ORS.**

HIGH COURT MALAYA, ALOR SETAR

KC VOHRAH J

[CIVIL APPEAL NO. 11-27-1989]

25 AUGUST 1991

CIVIL PROCEDURE: *Application for leave to file petition out of time - Absence of expert provision - Represented by solicitors - Time limit for giving appeal - Undue delay - Mistake of legal adviser as to applicability - Whether there are merits in the appeal - Subordinate Courts Rules O. 49 r. 3A(3).*

The defendant lost his case in the Magistrate Court below and filed an appeal against the said decision.

He then filed this application in the High Court for leave to file his petition of appeal out of time.

The respondents filed an affidavit which claimed undue delay in the original application and the absence of merit in the applicant's appeal. The applicant then filed an affidavit in reply on 14 April 1991. This was an affidavit by the applicants' solicitors explaining for the first time that the solicitor had made a mistake on the applicable rule as regards the time within which to file the record of appeal. By the time this affidavit was filed disclosing the reason for the application for extension of time, about 1 year 2 months had elapsed from the date of expiry of the period for filing the appeal record. There can be no question that there was delay, undue delay, in making out through that affidavit the reason for the application for leave to file the appeal record out of time bearing in mind that the time for filing the appeal record had run out sometime in February 1990.

Held:

[1] Notwithstanding the absence of an express provision in the Subordinate Courts Rules 1980 (SCR) for a petition of appeal to be filed, my view is that it (by whatever name) had to be filed and an appellant who is represented by solicitors must file a memorandum of appeal within 6 weeks from the date of receipt of the notification from the Court appealed from that the certified notes of evidence and the grounds of judgment are ready under O. 49 r. 3A(3) of the SCR.

[2] When the application for leave to file the "petition of appeal" was filed on 7 January 1990 in actual fact, under r. 3A of the SCR., the time limited for filing the appeal record had not expired. Under the new rule, r. 3A, the appeal record had to be filed and that it had to be filed within 6 weeks from the date of receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and grounds of judgment are ready. The applicant's solicitors received the notification on 6 January 1990 and time would have expired 6 weeks from that date but on 7 January 1990 he filed his application for leave to file his petition of appeal out of time in the High Court.

[3] By the time this affidavit was filed disclosing the reason for the application for extension of time about 1 year 2 months had elapsed from the date of expiry of the period for filing the appeal record. There can be no question that there was delay, undue delay, in making out through that affidavit the reason for the application for leave to file the appeal record out of time bearing in mind that the time for filing the appeal record had run out sometime in February 1990.

a [4] The delay in the application caused by a mistake of a legal adviser does not preclude the Court from granting leave if the delay is exceptional. I have to take into account the inordinate delay on the part of the applicant in making out the reason for the present application for leave to file the appeal record out of time and there is no explanation given for the inordinate delay.

b [5] The submissions made to the Magistrate do not disclose that there are merits in the appeal. And nothing advanced before this Court discloses that there is an arguable case to be dealt with. I do not see why the plaintiffs should be prejudiced by my extending the time and having to be put to further defending what they had obtained as their fruits of litigation in the Court below for even now, as the affidavits disclose, the defendant continues to occupy and cultivate the said land.

c [*Applicant's application dismissed with costs.*]

Cases referred to:

Kuching Pharmacy Sdn. Bhd. v. JL. Morison Son & Jones (M) Sdn. Bhd. [1990] 2 CLJ (Rep) 293 (fol)

Sinnathamby & Anor. v. Lee Chooi Ying [1987] CLJ (Rep) 336 (cit)

Gatti v. Shoosmith [1939] 3 All ER 916 (cit)

d *Palata Investments Ltd. & Ors. v. Burt & Sinfield Ltd. & Ors.* [1985] 2 All ER 517 (cit)

Legislation referred to:

National Land Code 1965, s. 340(1), (2)

Rules of the High Court 1980, O. 55

Subordinate Courts Rules 1980, O. 49 r. 3A(3)

e *For the appellant - Dato' Hj. Abu Bakar b. Rautin; M/s. Oo Gin Sun, Bakar & Co.*

For the respondent - Choe Kuan Him; M/s. Syarikat Choe

JUDGMENT

KC Vohrah J:

f In the Magistrate's Court below the applicant who was the defendant in the case lost his case. He filed an appeal against the decision of the Magistrate and on the same day that he filed his appeal his solicitors served a copy of the notice of appeal on the plaintiffs' solicitors.

The application that was filed in the High Court is for leave for the applicant to file his "petition of appeal" out of time.

g There is now no explicit provision for a "petition of appeal" in the amended rules under O. 49 of the Subordinate Courts Rules (SCR). Instead an "appeal record" has to be prepared. In the case of an appellant who is represented by a solicitor r. 3A provides for two appeal records to be filed in the High Court within 6 weeks of the (date of) receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and the grounds of judgment are ready.

h Notwithstanding the absence of an express provision in the SCR for a petition of appeal to be filed, my view is that it (by whatever name) has to be filed and I respectfully agree with the views of my learned brother Haidar J in *Kuching Pharmacy Sdn. Bhd. v. JL. Morison Son & Jones (M) Sdn. Bhd.* [1990] 2 CLJ (Rep) 293 (who also considered O. 55 of the Rules of The High Court 1980) that an appellant who is represented by solicitors must file a memorandum of appeal within 6 weeks from the date of receipt of the notification from the Court appealed from that the certified notes of evidence and the grounds of judgment are ready under O. 49 r. 3A(3) of the SCR.

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I now come back to the applicant's petition of appeal. When the application for leave to file the "petition of appeal" was filed on 7 January 1990 in actual fact, under r. 3A of the SCR the time limited for filing the appeal record had not expired. It is quite clear that the affidavit of the applicants' solicitor in support of the application showed that the solicitor was not aware that under the new rule, r. 3A, the appeal record had to be filed and that it had to be filed within 6 weeks from the date of receipt of the notification from the Court appealed from that the certified copies of the notes of evidence and grounds of judgment are ready. The applicant's solicitors received the notification on 6 January 1990 and time would have expired 6 weeks from that date but on 7 January 1990 he filed his application for leave to file his petition of appeal out of time in the High Court.

Clearly that application is misconceived but Counsel for the respondents has agreed to treat the motion "as procedurally valid"; he has agreed to treat the motion as an application for extension of time to file the memorandum of appeal.

The hearing of the motion was postponed several times as either one or the other Counsel had applied for the adjournment of the hearing of case for various reasons. About 1 year after the misconceived application was made, on 22 February 1991 the respondents filed an affidavit affirmed by their solicitor which claimed undue delay in the original application and the absence of merit in the applicant's appeal. The applicant then filed an affidavit in reply on 14 April 1991. This was an affidavit by the applicants' solicitor explaining for the first time that the solicitor had made a mistake on the applicable rule as regards the time within which to file the record of appeal. By the time this affidavit was filed disclosing the reason for the application for extension of time about 1 year 2 months had elapsed from the date of expiry of the period for filing the appeal record. There can be no question that there was delay, undue delay, in making out through that affidavit the reason for the application for leave to file the appeal record out of time bearing in mind that the time for filing the appeal record had run out sometime in February 1990.

The delay in the application caused by a mistake of a Legal Adviser does not preclude the Court from granting leave if the delay is exceptional (see *Sinnathamby & Anor. v. Lee Chooi Ying* [1987] CLJ (Rep) 336 where *Gatti v. Shoosmith* [1939] 3 All ER 916 and *Palata Investments Ltd. & Ors. v. Burt & Sinfield Ltd. & Ors.* [1985] 2 All ER 517 were considered). But in this case I have to take into account the inordinate delay on the part of the applicant in making out the reason for the present application for leave to file the appeal record out of time and there is no explanation given for the inordinate delay.

As for the claim that there are merits in the appeal the written submissions of both the parties which were made before the Magistrate were attached to the affidavit supporting the present application. The plaintiffs were registered co-owners of a piece of land. They alleged that the defendant's father who was in occupation of the land and who cultivated the land was their tenant. Following his death in 1965 the defendant took over cultivation of the land. In 1980 the plaintiffs requested the defendant to call on the plaintiffs to execute a tenancy agreement but he failed to do so and failed to pay rental on the land. The plaintiffs sued for vacant possession of the land and arrears of rent. The defendant disputed the plaintiffs' title to the land notwithstanding that the plaintiffs were registered under the National Land Code as co-owners and have an indefeasible title to the land under s. 340(1) of the Code. The indefeasibility of the title of the plaintiffs can only be defeated if it can be proved that the plaintiffs had obtained the said land by circumstance of fraud, misrepresentation etc. under s. 340(2) of the Code. But none of the circumstances set out in s. 340(2) was pleaded.

a And no dispute of title appeared to arise from the facts adduced in the case. The submissions made to the Magistrate do not disclose that there are merits in the appeal. And nothing advanced before this Court discloses that there is an arguable case to be dealt with.

b I also do not see why the plaintiffs should be prejudiced by my extending the time and having to be put to further defending what they had obtained as their fruits of litigation in the Court below for even now, as the affidavits disclose, the defendant continues to occupy and cultivate the said land. The application is dismissed with costs.

Also found at [1991] 3 CLJ 2217

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